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IN THE SUPREME COURT OF GEORGIA

No. 17851

CITY OF ATLANTA,
Plaintiff in Error,

vs.

PAUL ANGLIN, SR., ET AL.,
Defendants in Error

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, appellant submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court of Georgia entered in this case.

Opinion Below

The opinion of the Supreme Court of Georgia has not been reported. A copy of the amended opinion and judgment is attached hereto as Appendix "A".

Jurisdiction

The judgment of the Supreme Court of Georgia was entered June 10, 1952. A petition for appeal is presented to the Chief Justice of the Supreme Court of Georgia herewith, to-wit, on the 29th day of August, 1952. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28,

Section 1257(2) of the United States Code. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Largent* v. *Texas*, 318 U. S. 418; *Dahnke-Walker Milling Company* v. *Bondurant*, 257 U. S. 282. Appellant challenged the validity of a statute of Georgia as being repugnant to the Constitution of the United States and the final decision of the Supreme Court of the State of Georgia is in favor of the validity of the statute. This question was raised in the court of first instance by pleading wherein the appellant sought a declaratory judgment. Among other things, appellant plead that the provisions of an act of the General Assembly of Georgia, approved August 24, 1931 (Ga. Laws, 1931, pp. 223-228), as follows: "Should there be on hand insufficient funds to carry out the purposes of this act, such additional funds as are necessary therefor shall be paid out of the treasury of the City" is violative of Article I, Section X, Clause I of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts (Paragraph 12(f) of petition as amended). A declaratory judgment was entered on the petition that said act is not unconstitutional for any reason assigned in the petition (Appendix "C", Paragraph 3). The Supreme Court of Georgia affirmed the judgment (Appendix "A"). In discussing this question, the Supreme Court of Georgia said:

> "5. The plaintiff contends, and counsel has earnestly argued, that the amending act of 1931, and particularly that part of section 6 thereof which is quoted in our statement of the facts, impaired the obligation of its contract as created under and in consequence of the original pension act of 1924 by imposing further burdens upon it and by conferring additional benefits upon the defendant firemen; hence it offends article I, section 3, paragraph 2 of the Georgia Constitution of 1877

and article I, section 10, paragraph I of the Constitution of the United States, which inhibit the enactment of any law impairing the obligation of a contract. Conceding, but not holding, this to be true, a reversal of the judgment presently complained of would not be required; and this is true because the services rendered by these defendant firemen and the contributions they made to the city's pension fund, after the passage and approval of the amending act of 1931, provided and furnished ample consideration for a new pension contract under the amending act. See, in this connection, Bender v. Anglin, supra." (Appendix "A", paragraph 5).

Defendants in paragraphs 5 and 6 of their answer allege that insofar as the amendment of 1935 (Ga. Laws, 1935, p. 450) and the amendment of 1945 (Ga. Laws, 1945, p. 1080), insofar as these acts can be construed to reduce the pension of the defendants below, are each unconstitutional and violate Article I, Section X, Paragraph I of the Constitution of the United States, which prohibits any state from passing any *ex post facto* law or law impairing the obligation of a contract. The court in the first instance entered the following judgment:

> "6. Insofar as the Acts of 1935 or 1945 are construed to effect a reduction in the amount of the pension which was due the defendants under the Acts of 1924 and 1931, supra, such Acts as applied to the defendants were unconstitutional and void as attempts to impair the obligation of a contract, and to destroy vested rights, contrary to the State and Federal Constitutions." (Appendix "C", paragraph 6).

Error was assigned on the declaratory judgment of the Fulton Superior Court in the bill of exceptions to the Supreme Court of Georgia and the Supreme Court of Georgia sustained and affirmed the said judgment.

Questions Presented

The basic questions presented are as follows:

1. Did the 1931 amendment to the fireman's pension act impair the obligation of the pension contracts previously made between the city and the firemen by increasing the obligation of the city?

2. Did the 1931 amendment to the fireman's pension act increasing the obligation of the city become a part of the pension contracts previously made which could not be reduced by subsequent amendment to the fireman's pension act?

3. Did the 1935 amendment to the fireman's pension act, by reducing the amount of the pension obligation of the city, impair the obligation of contracts previously made?

4. Did the 1945 amendment to the fireman's pension act, by reducing the pension obligation of the city, impair the obligation of the pension contracts previously made?

We, of course, rely upon all other points set forth in the assignment of errors filed herewith.

Statutes Involved

Georgia Laws, 1924, p. 167; Georgia Laws, 1931, p. 223; Georgia Laws, 1935, p. 450; Georgia Laws, 1945, p. 1080, as set forth in Appendix "B" attached hereto.

The main controversy here is controlled by the construction and validity of the following portion of Section 6 of the Act approved August 24, 1931 (Ga. Laws, 1931, pp. 223-228) to-wit: "Should there be on hand insufficient funds to carry out the purposes of this act, such additional funds as are necessary therefor shall be paid out of the treasury of the City."

Statement of the Case

In 1924, the General Assembly of Georgia passed an Act to provide pensions for members of paid fire departments

in cities having a population of more than 150,000 by the United States Census of 1920 or any subsequent census. That act provided for the establishment of a Board of Trustees to administer the pension funds created by the Act and created a fund from which such pensions should be paid by imposing a tax of 1¼% against the premiums of all fire and lightning insurance companies on property situated within the corporate limits of such cities and a tax of 1% on the salaries of all members in active service. The act required these funds to be set apart and kept separate from all other funds of such cities and authorized the payment of a pension to such members after 25 years of service equal to one-half of the salary of any such member at the time of retirement. The pension was to be paid exclusively from the funds raised under the terms of said act.

The City of Atlanta being within the population classification immediately made provision for the establishment of the pension fund. The defendants in the court of first instance at the time of the passage of said act were employed by the City of Atlanta as firemen and were members of the paid fire department of the City of Atlanta. One of the conditions on the right to the pension under said act was that the member of the department should complete 25 years of service and be on the payroll at the time of his retirement. The said fireman's pension act was amended in 1931 (Ga. Laws, 1931, pp. 223, et seq.), in 1935 (Ga. Laws, 1935, pp. 450, et seq.), and in 1945 (Ga. Laws, 1945, pp. 1080, et seq.), so as to change in various particulars the original act and finally provided a pension rate of $100.00 per month. Each of the defendant firemen in the court of first instance completed the required service and retired after the passage of the 1945 amendment at the monthly pension rate of $100.00 per month. Subsequently thereto each of said defendants filed an application with the pension board created by said Act, as amended, a demand that his pension be increased to

an amount equal to one-half pay on the ground that statutes reducing the amount of the pensions were unco tutional for the reason that these acts impaired vested tractual rights. The pension board did not have the m in the pension fund with which to meet the claimed tional payments. The statutory obligation to pay pens has been met in full. If there is a contractual vested to pensions based on half pay at the time of retirement claimed obligations can only be met by the assessmer taxes by the City of Atlanta and the payment of the ciencies out of the general treasury of the City.

The appellant brought its petition in the Superior C of Fulton County in which it sought a decree fixing rights, obligations and legal relations of the city and of the several defendants arising out of the fireman's sion act of 1924 and the several acts amendatory there

The appellants in the court of first instance conte that the 1931 amendment to the pension act requiring appellant to make up any deficiency in the pension fund unconstitutional and void and in violation of Artic Section X, Clause I of the Constitution of the United S in that the said amendment impaired the obligation of tracts previously entered into with the appellees. defendants below, the appellees, contended that the Ac 1935 and 1945, amending the firemen's pension act, unconstitutional and void and were violative of Artic Section X, Clause I of the Constitution of the United St

The court, after consideration of the pleadings only after argument of counsel thereon, being of the opinion no issue of fact was involved, entered a judgment ag the appellant and in favor of the appellees.

The Questions Are Substantial

This case presents questions that are extremely impo to the taxpayers of Georgia and the employees of the p

cal subdivisions thereof. The particular pension act is applicable only to cities having a population of more than 150,000 according to the United States Census but the decisions of the Supreme Court of Georgia may apply to all pension acts. Under the decision of the Supreme Court of Georgia, the General Assembly may at will amend the pension acts so long as the pension benefits are increased, but the General Assembly is powerless to protect taxpayers by reducing pension benefits. The original firemen's pension act appeared harmless so far as the obligation of taxpayers generally are concerned. That act provided that the pensions authorized should be paid only from the funds provided by the act, namely, a tax of 1% on the salaries of the firemen and an annual tax of 1¼% on the premiums of fire and lightning insurance companies on property situated within the corporate limits of such cities. The City was neither authorized nor required to assess and collect other taxes for the payment of the pension obligation created by the pension act. The 1931 amendment to the Act (Ga. Laws, 1931, p. 223-228) created a new and distinct liability on the part of the City and required that the City pay out of its general treasury any deficiency in the pensions authorized by the Act. This clearly made it obligatory upon the City to assess and collect from the taxpayers resident of the City a sufficient amount to make up any deficiency in the pension fund. The Supreme Court of Georgia has sustained this amendment against the contention that it violates Article I, Section X, Paragraph I of the Constitution of the United States, which inhibits the enactment of any law impairing the obligation of a contract and as a reason therefor, held that the services rendered by these defendant firemen and the contributions they made to the city's pension fund after the passage and approval of the amending Act of 1931, provided and furnished ample consideration for renewed pension contract under the amending act. The payments made

into the pension fund by the defendant firemen were not increased by the amending act. There is no allegation that there was any change in the nature and amount of the services rendered or to be rendered by the firemen. No affirmative action was taken by the City or the firemen to approve or disapprove the amending act. The firemen were under obligation to pay the 1% tax and to render the service under the original pension contract entered into in 1924. The services were a condition on the pension which required 25 years service.

There is considerable conflict of opinion as to whether an employee of a political subdivision of a State has a vested right to a pension. While the majority hold to the view that the law in existence at the time one enters public service does not form a part of the contract of employment, there are cases to the contrary. *MacQuillan, Municipal Corporations, 3rd Edition, Paragraph 12.144* and cases there cited.

We would particularly point out that in the instant case, all of the defendant pensioners in the court of first instance, were in service at the time the original act was passed and, therefore, the pension act did not form a part of the employment contract.

It is thought that the decision of the Supreme Court of Georgia in holding the 1931 amendment to the pension act, insofar as it made the City liable for any deficiency in the pension fund, is in conflict with the decision of the Supreme Court of the United States in the case of *Dodge, et al.* v. *Board of Education of the City of Chicago, et al.*, 302 U. S. 74, where the court held: "If, upon a construction of the statute, it is found that the payments are gratuities involving no agreement of the parties, the grant to them creates no vested right. *Pennie* v. *Reis*, 132 U. S. 464; *Lynch* v. *The United States*, 292 U. S. 571, 577 and cases cited." It is thought that a careful consideration of the conclusion of the Supreme Court of Georgia that the services rendered by

the defendant firemen and the contributions they made to the City's pension fund, after the approval of the amending Act of 1931, provided and furnished consideration for a new pension contract under the amending Act, will be found to be without factual or legal support.

Conclusion

We believe that the questions presented by this appeal are substantial and that they are of very great public importance.

Respectfully submitted,

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APPENDIX "A"

SUPREME COURT OF GEORGIA

Case No. 17851

CITY OF ATLANTA

v.

ANGLIN et al.

Decided June 10, 1952

BY THE COURT: CANDLER, *Justice:*

The Legislature of this State has passed four acts which by their terms apply to pensions for paid firemen of the City of Atlanta. They are the acts of 1924, 1931, 1935 and 1945. Under the act of 1924 (Ga. L. 1924, p. 167), any paid member of the fire department in a city having a population in excess of 150,000 by the United States census of 1920 or any subsequent census could retire from active service, as a matter of right, upon becoming totally disabled in the line of duty or after twenty-five years' active service with such fire department, and, in either event, he would thereafter be paid for the rest of his life a monthly pension in an amount equal to one-half of the monthly salary he was receiving at the time of his retirement. The act also provided for the creation of a board of trustees and for a tax on fire-insurance premiums and on the salaries of the firemen for the purpose of raising funds for the payment of the pensions provided for. The act of 1931 (Ga. L. 1931, p. 223) amended the act of 1924 and provided that any fireman, who retired as a matter of right, would thereafter receive for the rest of his life as a monthly pension a sum equal to one-half of his salary at the date of his retirement, but in no event to be less than $100 per month. It also provided (Sec. 6): "Should there be on hand insufficient funds to carry out the purpose of this act, such additional funds as are necessary therefor shall be paid out of the treasury of the city." The act of 1935 (Ga. L. 1935, p. 450) amended the act of 1924, as amended by the act of 1931, and provided

that any fireman, who retired as a matter of right, would thereafter receive for the rest of his life a monthly pension of $75. The act of 1945 (Ga. L. 1945, p. 1080) amended the act of 1924, as amended by the acts of 1931 and 1935, and provided that any fireman who retired as a matter of right, would thereafter receive for the rest of his life a monthly pension in an amount equal to 55% of his monthly salary as of the date of his retirement, but in no event more than $100 per month.

This litigation arose when the City of Atlanta filed a petition in the superior court of Fulton County for a declaratory judgment, and other related relief, against Paul Anglin, Sr., a retired city fireman; thirty-two other named, and similarly situated, retired firemen; and five named persons, in their official capacity as members of the Board of Trustees of the Firemen's Pension Fund for the City of Atlanta, the full membership of the board as then constituted. The petition was, however, subsequently dismissed voluntarily by the plaintiff as to the members of the Board of Trustees of the Firemen's Pension Fund, but on petition therefor by such trustees they were later allowed to intervene and become parties defendant. As to this there was no exception. The amended petition alleges that the defendant firemen were employees of and on the payrolls of the City of Atlanta's fire department when the pension act of 1924 was passed and approved, and thereafter until each retired as a matter of right after 25 years' active service with the fire department; that each contributed to the city's pension fund the full amount required of him; that each upon retirement applied for and was granted a monthly pension of $100 under the terms and pursuant to the provisions of the pension act of 1924, as amended by the act of 1945, which amount each has since accepted and retained; that each, during 1951, applied to the Board of Trustees of the Firemen's Pension Fund for the City of Atlanta for an adjustment of his respective pension claim and demanded payment, from the date of his retirement, of a monthly amount equal to one-half of the salary he was receiving monthly at the time of his retirement, less the amount of $100 which he had previously received monthly as a pen-

sion, and also demanded payment thereafter of a pension during the rest of his life of an amount per month equal to one-half of his monthly salary as of the date of his retirement; and that the Board of Trustees of the Firemen's Pension Fund approved his application as made and ordered its treasurer to make the adjusted payments accordingly, but such payments have not been made since funds on hand for that purpose were insufficient. The petition also alleges: The act of 1924 is unconstitutional and void because (a) it is a local or special act which undertakes to change the general law of this State declaring that "One council may not by an ordinance bind itself or its successors so as to prevent free legislation in matters of municipal government" and for that reason offends article 1, section 4, paragraph 1, of the Constitution of 1877 which provides that "Laws of a general nature shall have uniform operation throughout the State, and no special law shall be enacted in any case for which provision has been made by an existing general law;" (b) it, and particularly sections 2, 4 and 5 thereof, offend article 7, section 7, paragraph 1 of the Constitution of 1877 which prohibits the creation of a debt by counties, municipal corporations or political subdivisions of this State without the assent of two-thirds of the qualified voters thereof, voting at an election for that purpose to be held as prescribed by law; and (c) it, and particularly sections 2, 4 and 5 thereof, offend article 7, section 10, paragraph 1, of the Constitution of 1877 which provides that "Municipal corporations shall not incur any debt until provision therefor shall have been made by the municipal government." The amending act of 1931, and particularly that part of section 6 thereof which reads: "Should there be on hand insufficient funds to carry out the purposes of this Act, such additional funds as are necessary therefor shall be paid out of the treasury of the city" is unconstitutional and void because (a) it offends article 3, section 7, paragraph 8 of the Constitution of 1877 which provides that "No law or ordinance shall pass which refers to more than one subject-matter, or contains matter different from what is expressed in the title thereof;" (b) it, and especially the quoted part of section 6 thereof, offend article 7, section 7,

paragraph 1 of the Constitution of 1877 which prohibits the creation of a debt by counties, municipal corporations or political subdivisions of the State; (c) it, and particularly the quoted part of section 6 thereof, offend article 7, section 10, paragraph 1 of the Constitution of 1877 which provides that "Municipal corporations shall not incur any debt until provision therefor shall have been made by the municipal government;" (d) it, and particularly the quoted part of section 6 thereof, offend article 7, section 16, paragraph 1 of the Constitution of 1877 which provides that "The General Assembly shall not by vote, resolution or order, grant any donation or gratuity in favor of any person, corporation or association;" (e) it, and particularly the quoted part of section 6 thereof, offend article 1, section 3, paragraph 2 of the Constitution of 1877 which provides that no "ex post facto law, retroactive law, or law impairing the obligation of a contract" shall be passed; and (f) it, and particularly the quoted part of section 6 thereof, offend article 1, section 10, paragraph 1 of the Constitution of the United States which provides that no State shall pass any law impairing the obligations of a contract. The petition also alleges that the defendant firemen insist and contend that the amending acts of 1935 and 1945 are unconstitutional and void because they impair their pension contracts and thereby deprive them of vested contract rights acquired under the acts of 1924, as amended by the act of 1931, by reducing their respective pensions without their consent and in violation of article 1, section 3, paragraph 2 of the Constitution of 1877 which declares that no law shall be passed which impairs the obligation of a contract. It is also alleged that the defendant firemen, by accepting rights and benefits created by and conferred on them by the amending acts of 1935 and 1945 and by applying for a pension under the terms and provisions of the act of 1945 and by accepting and retaining the amounts allowed and paid to them as a pension, thereby estopped themselves to question the validity of the acts of 1935 and 1945, waived their pension rights under the act of 1924, as amended by the act of 1931, and agreed to a novation of their pension contracts created by the act of 1924, as

amended by the act of 1931. It is also alleged that the City of Atlanta made no provision in 1924, out of the revenue of that year, for the payment of any pension to retired firemen in future years, nor has it during any subsequent year made such provision; that the city does not have on hand any funds collected in prior years which have not been allocated to other contractual obligations; and that if the demands of the defendant firemen constitute contractual obligations which the city must pay, it will be necessary to assess and collect such funds from the taxpayers of the city during 1952 and subsequent years. Common questions of law and fact control the claim of each defendant fireman, and the court should by a declaratory judgment determine and settle the existing controversy concerning the constitutionality of the several pension acts involved, as well as the plaintiff's liability and the defendant firemen's rights thereunder, and thus prevent a multiplicity of suits between the parties. The defendant firemen demurred to the amended petition and by answer averred that they are entitled to the full pension benefits provided for by the act of 1924, as amended by the act of 1931, alleging also that the amending acts of 1935 and 1945 are unconstitutional and void since they lessen and thereby impair vested contract rights in violation of article 1, section 3, paragraph 2 of the Constitution of 1877. Upon the pleadings, the court decreed that the defendant firemen were entitled to a monthly pension for life equal to one-half of the monthly amount each was receiving as a salary at the time of his respective retirement and that each was entitled to be paid in a lump sum to January 1, 1952, the amount set opposite his name in paragraph 27 of the answer to the petition. The plaintiff excepted and sued out a writ of error to this court. Held:

1. There is no merit in the contention that the act of 1924 offends article 1, section 4, paragraph 1 of the Constitution of 1877 which provides that, "Laws of a general nature shall have uniform operation throughout the State, and no special law shall be enacted in any case for which provision has been made by an existing general law." The act applies alike to all cities of this State having a population in excess of 150,000 by the United States census of 1920 or

any subsequent census and is itself a general law, and not a special act or law as the plaintiff contends. See Barge v. Camp, 208 Ga. (70 S.E. 2d, 360), and the cases there cited.

2. Nor is there any merit in the contention that the act of 1924, and particularly sections 2, 4, and 5 thereof, and the amending act of 1931, and particularly that part of section 6 thereof which is quoted in our statement of the facts, violate article 7, section 7, paragraph 1 of the Constitution of 1877, which limits the rights of a municipal corporation to incur a debt. Nor is the act of 1924, and particularly sections 2, 4, and 5 thereof, and the amending act of 1931, and particularly that part of section 6 thereof which is quoted in our statement of the facts, violative of article 7, section 10, paragraph 1 of the same Constitution which provides that a municipal corporation shall not incur any debt until provision therefor shall have been made by the municipal government. West v. Trotzier, 185 Ga. 794 (196 S. E. 902).

3. That part of Section 6 of the amending act of 1921 which reads "Should there be on hand insufficient funds to carry out the purpose of this act, such additional funds as are necessary therefor shall be paid out of the treasury of the city" is germane to the general purpose of the act as indicated in the title and does not, as contended, offend article 3, section 7, paragraph 8 of the Constitution of 1877 which provides that "No law or ordinance shall pass which refers to more than one subject matter, or contains matter different from what is expressed in the title thereof." The general purpose of the act under attack, as indicated by its title, was to create pensions in favor of retired firemen and to provide funds necessary for their payment; consequently, the imposition of an obligation on the city affected thereby to supply funds when the amount on hand, as raised from other sources, was insufficient to carry out the purpose of the act was legitimately within the general scope of the act as indicated by its title. See, in this connection, Welborne v. State, 114 Ga. 793, 816 (40 S. E. 857); Davis v. Warde, 155 Ga. 748, 771 (118 S. E. 378); Wright v. Fulton County, 169 Ga. 354 (2 a) (150 S. E. 262); Williamson v. Housing Authority of Augusta, 186 Ga. 673, 679 (199 S. E. 43); Walker Electrical Co. v. Walton, 203 Ga. 246, 252 (46

S. E. 2d 184). In Davis v. Warde, supra, it was said: "The title of an act need not contain a synopsis of all of its provisions. Any legislation which is germane to the general purpose of the act as indicated in the title can be properly embraced in the act, and, no matter what may be its details, the legislation embraced therein will not render the act subject to the objection that it contains matter variant from the title, so long as such matter is legitimately within the general scope of the purpose of the act as indicated in the title."

4. In the circumstances of this case and adhering to our rulings in Trotzier v. McElroy, 182 Ga. 719 (186 S. E. 817); West v. Trotzier, supra; and Bender v. Anglin, 207 Ga. 108 (60 S. E. 2d, 756), it logically follows that there is no merit in the contention here made that the amending act of 1931, and particularly that part of section 6 thereof which is quoted in our statement of the facts, offend article 7, section 16, paragraph 1 of the Constitution of 1877 which provides that "The General Assembly shall not by vote, resolution, or order, grant any donation or gratuity in favor of any person, corporation, or association." We cannot agree with the argument of counsel for the plaintiff in error that West v. Trotzier, supra, is, on its facts, distinguishable from the case at bar.

5. The plaintiff contends, and counsel has earnestly argued, that the amending act of 1931, and particularly that part of section 6 thereof which is quoted in our statement of the facts, impaired the obligation of its contract as created under and in consequence of the original pension act of 1924 by imposing further burdens upon it and by conferring additional benefits upon the defendant fireman; hence it offends article 1, section 3, paragraph 2 of the Georgia Constitution of 1877 and article 1, section 10, paragraph 1 of the Constitution of the United States, which inhibit the enactment of any law impairing the obligation of a contract. Conceding, but not holding, this to be true, a reversal of the judgment presently complained of would not be required; and this is true because the services rendered by these defendant firemen and the contributions they made to the city's pension fund, after the passage and approval of the amending act of 1931, provided and furnished ample

consideration for a new pension contract under the amending act. See, in this connection, Bender v. Anglin, supra."

6. There is likewise no merit in the plaintiff's contention that the defendant firemen are, under the facts of this case, estopped by conduct to question the validity of the amending pension acts of 1935 and 1945, or that they have by conduct waived their pension rights under the provisions of the pension act of 1934, as amended by the act of 1931. There is no estoppel by conduct where both parties have equal knowledge or equal means of obtaining the truth. Wilkins v. McGehee, 86 Ga. 764 (13 S. E. 84). "In order for an equitable estoppel to arise, there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence as to amount to constructive fraud, by which another has been misled to his injury." Code, Sec. 38-116. In Tinsley v. Rice, 105 Ga. 285, 290 (31 S. E. 174), it was held: "In order to constitute estoppel by conduct, there must occur, first, a false representation or concealment of facts; second, it must be within the knowledge of the party making the one or concealing the other; third, the person affected thereby must be ignorant of the truth; fourth, the person seeking to influence the conduct of the other must act intentionally for that purpose; and fifth, the person complaining shall have been induced to act by reason of such conduct of the other." In this case no facts appear from which it can be said that the plaintiff has been injured or placed at any disadvantage by the conduct of the defendant firemen, and the record discloses no fact or circumstance from which we would be authorized to hold that the defendant firemen, by conduct, expressly or impliedly waived their pension rights under the act of 1924, as amended by the act of 1931, or agreed to a novation of their contract, as contended; consequently, no estoppel or waiver of vested rights or novation resulted therefrom as contended. See, in this connection, Best v. Maddox, 185 Ga. 78 (194 S. E. 578).

7. In the circumstances of this case and under the rulings made in Trotzier v. McElroy; West v. Trotzier; Bender v. Anglin, all supra; and Pierce v. Rhodes, 208 Ga. 554 (67 S. E. 2d, 771), the trial court correctly held that the amending pension acts of 1935 and 1945 offend article 1, section 3,

paragraph 2 of the Constitution of 1877, and are therefore unconstitutional and void in so far as they relate to a reduction of the pension benefits fixed by the act of 1924, as amended by the act of 1931, for paid city firemen who retire from active service as a matter of right.

8. For no reason assigned is the judgment complained of erroneous.

Judgment affirmed. All the Justices concur, except Atkinson, P. J., who did not participate, and Wyatt and Almand, JJ., who dissent. Head, J., concurs in the judgment only.

APPENDIX "B"

GEORGIA LAWS, 1924, PP. 167-173

AN ACT to provide that cities having a population of more than one hundred and fifty thousand (150,000) by the United States census of 1920 or any subsequent census shall furnish aid, relief and pensions to members of paid fire departments now in active service, and whose names are on the payroll of such department and to future members, and their dependents in specified cases. To provide how such members who have served twenty-five years may be retired for life on half pay. To provide how such members shall be paid in case of total disability resulting from such service, and how such total disability may be determined. To provide for relief in case of sickness or accident resulting from such service. To provide for the relief of dependents and to provide for widows and children of deceased pensioners to be paid in case of death of any such member resulting from said service. To provide that such cities shall levy tax of one (1%) per centum of the salaries of such members in active service and on pay rolls and to future members to raise in part the funds to pay such aids, reliefs and pensions, collectible monthly. To provide that such cities shall use one-fifth (1/5) of the tax collected on fire and lightning insurance companies or associations from the premiums

thereof on property situated within the corporate limits of such cities; to pay such aid, relief and pensions. To provide that such cities shall levy a tax of one and one-fourth (1¼) per centum on the premiums of such fire and lightning insurance companies on property situated within the corporate limits of such cities. To provide that one and one-fourth (1¼) per centum shall be the limit which such cities shall be allowed to tax the premiums of such fire and lightning insurance companies or associations on premiums collected on property situated in the corporate limits of such cities. To provide how such funds shall be collected, deposited and managed for the members of such fire departments now in active service and whose names are on the pay roll of such departments and for future members. To create a board of trustees and provide for their selection and election, to manage, deposit, disburse upon order and invest said funds which shall be raised by the one (1) per centum tax on the salaries of members now in active service and future members, and one-fifth (1/5) of the premium tax on fire and lightning insurance taxes. To provide that this act shall not repeal nor in any wise affect any benefit or pension now being paid to those who were receiving the same prior to the passage of this act; and that this act shall not apply to those receiving pensions or benefits prior to the passage of this act. To provide that such board of trustees shall make all necessary rules for carrying out the terms of this act. To provide that in case there shall at any time be on hand less funds than are needed, the actual funds shall be prorated among the beneficiaries. To provide that none of the funds mentioned shall be subject to attachment, garnishment, judgment; nor shall they be assignable; but shall be paid in cash to the beneficiary if so requested by him or her. To provide that if any part of this act shall be held unconstitutional, the remainder of this act shall remain in force taken in connection with existing laws. To provide that this act shall not affect nor be affected by any workmen's compensation act or other similar laws. To repeal conflicting laws, and for other purposes.

Section 1. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, that from and after the passage of this Act there shall be raised and established funds for the aid, relief and pension of members of paid fire departments who are in active service at the time of the passage of this Act and whose names are on the pay roll of such departments and future members of such departments, and their dependents in all cities in Georgia having a population of more than one hundred and fifty thousand (150,000) by the United States census of 1920 or any subsequent census of the United States.

Section 2. Be it further enacted that any member of such fire department who is in active service at the time of the passage of this Act and whose name is on the pay roll, and future members, may as a matter of right, retire from active service, provided he shall have served twenty-five (25) years in active service at the time of his retirement.

Section 3. Be it further enacted that any member of such department who is in active service at the time of the passage of this Act and whose name is on the pay roll and future members who shall be injured or whose health shall become permanently impaired to such an extent as to render him totally disabled as a result of such service shall upon application be retired. Should the board of trustees refuse to grant an order of retirement, the applicant shall select a physician, the board shall select a physician, and the two physicians so selected shall select a third. These three shall examine the applicant and determine whether he is totally disabled and the decision of a majority of these physicians shall be final on the question.

Section 4. When such member shall retire as a matter of right he shall be paid one-half of the salary he was receiving at the time of his retirement, for the rest of his life, to be paid monthly. In case of death of a pensioner his widow and children shall draw his pension as herein provided in case of death of member of such department.

Section 5. When such member shall be retired for total disability he shall be paid one-half of the salary he was receiving at the time of his retirement for the rest of his life, to be paid monthly, but this Act shall not affect the salary of

a member in active service, except the tax of one (1) per cent thereon.

Section 6. Be it further enacted that there is hereby established, to serve without pay, a board of trustees whose duties it shall be to manage said funds which shall be kept by the City Treasurer of such cities as a separate fund and covered by his bond as such. The board of trustees shall consist of the city treasurer, the city comptroller, the chief of the fire department and two members of the fire department to be elected by the members of said department in active service on the first Monday in September every year after the passage of this Act. These two members of the department to serve one year and until their successors are elected. The city comptroller, city treasurer and chief of the fire department to be permanent members of the board.

Section 7. This board shall make all rules for the payment of said funds to those entitled to receive the same. It shall have its first meeting on Wednesday following the first Tuesday in September after the passage of this Act and organize by electing a chairman, a vice-chairman who shall serve when the chairman is absent, and a secretary. The chairman shall sign all vouchers for the disbursements of the fund and his written order shall fully protect the city treasurer in the payment of the same. A majority of the board shall control on all questions.

Section 8. The board shall make its own rules as to times and places of meetings.

Section 9. A tax of one (1) per centum shall be levied on the salaries of all members in active service at the time of the passage of this Act monthly; and the city treasurer shall retain that amount from their salaries.

Section 10. A tax of one and one-fourth (1¼) per centum shall be levied against the premiums of all fire and lightning insurance companies or associations on property situated within the corporate limits of such cities, and returns by said companies or associations made and tax collected as now provided by ordinance in such cities, to be collected from and after passage of this Act. One-fifth (1-5) of the tax provided in this section shall go to aid, relief, and pension funds provided in this Act.

Section 11. The city treasurer shall keep separate and apart from other monies in his possession the funds raised in Sections 9 and 10 hereof for the sole uses mentioned in this Act, and subject to the orders of said board of trustees.

Section 12. The said city tax on insurance premiums on property situated in the corporate limits of such cities shall be and is hereby limited to one and one-fourth (1¼) per centum.

Section 13. The board of trustees shall formulate rules for taking care of members in active service at the time of the passage of this Act while temporarily sick or hurt, and paying the expenses thereof. The board of trustees shall formulate rules for paying the pension of a member of the department who loses his life in the service to his widow till she dies or remarries; and for paying to widow and children pension of deceased pensioner; and for paying the pension of such deceased fireman to his orphan children till they reach the age of sixteen; provided the total payments to widow and orphan or orphans shall not exceed one-half the pay of such deceased fireman. The trustees shall keep a strict account of the disbursements and receipts of all funds which shall be open at all times to public inspection.

Section 14. In case a member has served twenty-five years does not desire to retire, and the board of trustees deem such member incapable of further service in the department; the same proceeding shall be had as that to determine the condition of a disabled fireman as set forth in Section three (3) hereof. The decision shall be final.

Section 15. The city attorney shall without extra compensation render such legal service as such board of trustees shall require.

Section 16. In case there should accumulate more funds than should be needed for immediate use, the board of trustees are empowered to invest such excess funds in United States, Georgia, or municipal bonds; but not otherwise.

Section 17. Be it further enacted that none of the funds herein mentioned shall be subject to attachment, garnishment, judgment; nor shall they be assignable; but shall be paid in cash to the beneficiary if so requested by him or her.

Section 18. Be it further enacted that if any part of this Act shall be held unconstitutional, the remainder of this Act shall be of full force and effect provided the general terms of this Act can still be carried out.

Section 19. Be it further enacted that this Act shall not repeal nor in any wise affect any benefit or pension now being paid to those who were receiving the same prior to the passage of this Act.

Section 20. Be it further enacted that the plan and purpose of this Act is to furnish aid, relief and pension to aged and disabled firemen who are now or may be in the future in the active service of such departments and on the pay roll of such departments and to their dependents. That the taxation herein provided is a part of the general purpose of this Act to accomplish this end.

Section 21. Provided this Act shall not affect or be affected by any workmen's compensation law, or other similar laws.

Section 22. Be it further enacted that all laws and parts of laws in conflict herewith, be and the same are hereby repealed.

Approved August 13, 1924.

GA. LAWS, 1931, P.P. 223-228

An Act to amend an act approved August 13, 1924, published in acts of 1924 on pages 167 to 173, inclusive, entitled: An Act to Provide That Cities Having a Population of More Than One Hundred and Fifty Thousand (150,000) by the United States Census of 1920 or any Subsequent Census Shall Furnish Aid, Relief, and Pensions to Members of Paid Fire Departments Now in Active Service, and Whose Names are on the Payroll of Such Department and to Future Members, and Their Dependents in Specified Cases. To provide how such members who have served twenty-five years may be retired for life on half pay. To provide how such members shall be paid in case of total disability resulting from such service, and how such total disability may be determined. To provide for relief in case of sickness or accident resulting from such service. To provide for the

relief of dependents and to provide for widows and children of deceased pensioners to be paid in case of death of any such member resulting from said service. To provide that such cities shall levy tax of one (1%) per centum on the salaries of such members in active service and on pay-roll and to future members to raise in part the funds to pay such aids, reliefs and pensions, collectible monthly. To provide that such cities shall use one fifth (1/5) of the tax collected on fire and lightning insurance companies or associations from the premiums thereof on property situated within the corporate limits of such cities; to pay such aid, relief, and pensions. To provide that such cities shall levy a tax of one and one fourth (1¼) per centum on the premiums of such fire and lightning insurance companies on property situated within the corporate limits of such cities. To provide that one and one fourth (1¼) per centum shall be the limit which such cities shall be allowed to tax the premiums of such fire and lightning insurance companies or associations on premiums collected on property situated in the corporate limits of such cities. To provide how such funds shall be collected, deposited, and managed for the members of such fire departments now in active service and whose names are on the pay-roll of such departments and for future members. To create a board of trustees and provide for their selection and election, to manage, deposit, disburse upon order and invest said funds which shall be raised by one (1) per centum tax on the salaries of members now in active service and future members, and one fifth (1/5) of the premium tax on fire and lightning insurance taxes. To provide that this act shall not repeal nor in any wise affect any benefit or pension now being paid by those who were receiving the same prior to the passage of this act; and that this act shall not apply to those receiving pensions or benefits prior to the passage of this act. To provide that such Board of Trustees shall make all necessary rules for carrying out the terms of this act. To provide that in case there shall at any time be on hand less funds than are needed, the actual funds shall be prorated among the beneficiaries. To provide that none of the

funds mentioned shall be subject to attachment, garnishment, judgment; nor shall they be assignable; but shall be paid in cash to the beneficiary if so requested by him or her. To provide that if any part of this act shall be held unconstitutional, the remainder of this act shall remain in force taken in connection with existing laws. To provide that this act shall not affect nor be affected by any workmen's compensation act or other similar laws. To repeal conflicting laws; and for other purposes," so as to provide for amount of pensions payable to present and future pensioners thereunder or to their widows, minor children, or widowed mothers in the event of the death, retirement, or disability of pensioners; so as to provide for the payment in certain instances to pensioners' estates or beneficiaries of all premiums paid by pensioners; so as to provide for additional funds for said pensions and for any deficiency in said pension fund; so as to provide for the change in term of two trustees of said fund and for election of said two trustees; so as to provide amount of pensions to be paid those now receiving pensions; and for other purposes.

Section 1. Be it enacted by the General Assembly of Georgia, and it is hereby enacted by authority of the same that from and after the passage of this Act, a certain Act approved August 13, 1924, published in the Acts of 1924, pages 167 to 173 inclusive, entitled "An Act to provide that cities having a population of more than one hundred fifty thousand (150,000) by the United States Census of 1920 or any subsequent census, shall furnish aid, relief, and pensions to members of paid fire departments now in active service, etc.; and for other purposes," and Acts amendatory thereof, be and the same is hereby amended by striking section 4 of said Act and inserting in lieu thereof a new section 4 which shall read as follows: Section 4. When such member shall retire as a matter of right, he shall be paid thereafter one half of the salary he was receiving at the time of his retirement for the rest of his life, unless said one-half salary should be less than $100.00 per month, in which event the sum of $100.00 per month shall be paid for the rest of his life, to be paid monthly, provided he shall have served the

25 years in activ service at the time of his retirement, or shall have become totally disabled in the line of duty at any time as aforesaid. In case of death of a pensioner, his widow, if any, shall receive during her life and until remarried, the amount of pension being paid to said pensioner at the time of his death. If pensioner leaves no widow, but leaves orphan children under the age of 16 years, such orphan child or children shall receive until reaching the age of 16 years the pension being paid to said pensioner at the time of his death. Upon the death of any pensioner under this Act, from any cause, who has no dependant entitled to his pension, the money he has paid into the pension fund shall be paid to his beneficiaries or to his estate at his death. Upon the death of an unmarried pensioner who is supporting a widowed mother, the amount of pension being paid to him at the time of his death shall thereafter be paid to his said mother during the period of her life or until she marries.

Sec. 2. Be it further enacted that section 5 of the aforesaid Act approved August 13, 1924, be and the same is hereby stricken and a new section 5 inserted in lieu thereof, which shall read as follows, to wit: Section 5. When such member shall be retired for total disability, he shall be paid one-half of the salary he was receiving at the time of his retirement (or the sum of $100.00 per month if said one-half of his salary does not equal or exceed that sum) for the rest of his life, to be paid monthly; but this Act shall not affect the salary of a member in active service, except the tax of one (1%) per cent, thereon.

Sec. 3. The aforesaid Act approved August 13, 1924, is further amended by inserting after section 5 of said Act a new section to be known as Section 5-a, said section to read as follows: Section 5-a. Should any member become totally disabled (not from self-abuse) so as to make such member unfit for fire duty or services, he shall receive a pension graduated according to the length of his service before such disability as follows:

Five (5) years service	$ 20.00 per month
Ten (10) years service	40.00 per month
Fifteen (15) years service	60.00 per month
Twenty (20) years service	80.00 per month
Twenty-five (25) years service	100.00 per month

Upon the death of such member while receiving this pension, his widow, if any, shall continue to draw the same during her life or until she remarries; and if no widow, his minor child or children shall draw the same until reaching the age of 16.

Sec. 4. Said Act approved August 13, 1924, is further amended by adding thereto after section 6 a new section to be known as Section 6-a, which shall read as follows: Section 6-a. The two trustees who are members of the fire department and who are elected the first Monday in September 1931 shall be elected for a term of four (4) years and two (2) years respectively, the trustee receiving the highest number of votes to serve for four years and the one receiving the next highest number of votes to serve for two years, and their successors thenceforth to serve for terms of four years.

Sec. 5. Said section 10 of said Act approved August 13, 1924, is hereby amended by striking the same in its entirety and inserting in lieu thereof a new section 10 which shall read as follows: Section 10. A tax of one and one fourth (1¼) per centum shall be levied against the premiums of all fire and lightning insurance companies or associations on property situated within the corporate limits of such cities, and returns by said companies or associations made and tax collected as now provided by ordinance in such cities, to be collected from and after the passage of this Act. The tax provided in this section shall go to aid, relief, and pension funds provided in this Act.

Sec. 6. Said Act approved August 13, 1924, is further amended by striking therefrom section 16 thereof and inserting in lieu thereof a new section thereby known as section 16, which shall read as follows: Section 16. In case there should accumulate more funds than should be needed for immediate use, the board of trustees are empowered to invest such excess funds in United States, Georgia, or municipal bonds; but not otherwise. Should there be on hand insufficient funds to carry out the purposes of this Act, such additional funds as are necessary therefor shall be paid out of the treasury of the city.

Sec. 7. Be it further enacted, that all persons now receiving pensions under the provisions of said Act approved

August 13, 1924, shall henceforth receive such pensions in the amounts provided for in this Act.

Sec. 8. Be it further enacted, that all laws and parts of laws in conflict herewith be and the same are hereby repealed.

Approved August 24, 1931.

GA. LAWS, 1935, PP. 450-456

AN ACT to amend an act approved August 13, 1924, published in Acts of 1924 on pages 167 to 173, inclusive, and all laws amendatory thereto, entitled: "An Act to Provide that Cities Having a Population of More than One Hundred and Fifty Thousand (150,000) by the United States Census of 1920 or Any Subsequent Census Shall Furnish Aid, Relief, and Pensions to Members of Paid Fire Departments Now in Active Service, and Whose Names Are on the Payroll of such Department and to Future Members and Their Dependents in Specified Cases. To provide how such members who have served twenty-five years may be retired for life on half pay. To provide how such members shall be paid in cases of total disabilty resulting from such service, and how such total disability may be determined. To provide for relief in case of sickness or accident resulting from such service. To provide for the relief of dependents and to provide for widows and children of deceased pensioners to be paid in case of death of any such member resulting from said services. To provide that such cities shall levy tax of one (1%) per centum on the salaries of such members in active service on pay-roll and to future members to raise in part the funds to pay such aids, reliefs and pensions, collectible monthly. To provide that such cities shall use one-fifth (1/5) of the tax collected on fire and lightning insurance companies or associations from the premiums thereof on property situated within the corporate limits of such cities; to pay such aid, relief and

pensions. To provide that such cities shall levy a tax of one and one-fourth (1¼) per centum on the premiums of such fire and lightning insurance companies on property situated within the corporate limits of such cities. To provide that one and one-fourth (1¼) per centum shall be the limit which such cities shall be allowed to tax the premiums of such fire and lightning insurance companies or associations on premiums collected on property situated in the corporate limits of such cities. To provide that one and one-fourth (1¼) per centum shall be the limit which such cities shall be allowed to tax the premiums of such fire and lightning insurance companies or associations on premiums collected on property situated in the corporate limits of such cities. To provide how such funds shall be collected, deposited, and managed for the members of such fire departments now in active service and whose names are on the pay-roll of such departments and for future members. To create a board of trustees and provide for their selection and election, to manage, deposit, disburse upon order and invest said funds which shall be raised by one (1%) per centum tax on the salaries of members now in active service and future members, and one-fifth (1/5) of the premium tax on fire and lightning insurance taxes. To provide that this act shall not repeal nor in any wise affect any benefit or pension now being paid by those who were receiving the same prior to the passage of this act; and that this act shall not apply to those receiving pensions or benefits prior to the passage of this act. To provide that such board of trustees shall make all necessary rules for carrying out the terms of this act. To provide that in case there shall at any time be on hand less funds than are needed, the actual funds shall be prorated among the beneficiaries. To provide that none of the funds mentioned shall be subject to attachment, garnishment, judgment nor shall they be assignable; but shall be paid in cash to the beneficiary if so required by him or her. To provide that if any part of this act shall be held unconstitutional, the remainder of this act shall remain in force taken in connection with existing laws. To provide that this act shall not affect

nor be affected by any workman's compensation act or other similar laws. To repeal conflicting laws; and for other purposes," so as to provide for amount of pensions payable to present and future pensioners thereunder or to their widows, minor children, in the event of the death, retirement, or disability of members or pensioners; so as to provide for the payment in certain instances to pensioners' estates or beneficiaries of all premiums paid by pensions; so as to provide for a certain portion of the revenue in certain cities being set aside or applied for purposes of the act; so as to provide for the change in term of three trustees of said fund and for election of said three trustees; so as to provide amount of pensions to be paid those now receiving pensions; so as to increase the percentage of salaries of members to be paid into fund for purposes of the act, and for other purposes.

Section 1. Be it enacted by the General Assembly of Georgia, and it is hereby enacted by authority of the same, that from and after the passage of this Act, a certain Act approved August 13, 1924, published in the Acts of 1924, pages 167 and 173 inclusive, entitled "An Act to provide that cities having a population of more than one hundred fifty thousand (150,000) by the United States census of 1920 or any subsequent census, shall furnish aid, relief and pensions to members of paid fire departments now in active service, etc., and for other purposes," and Acts amendatory thereof, be and the same is hereby amended by striking section 4 of said Act as amended and inserting in lieu thereof a new section 4 which shall read as follows:

Section 4. When such member shall retire as a matter of right, he shall be paid thereafter for the rest of his life the sum of $75.00 per month, provided he shall have served the 25 years in active service at the time of his retirement, or shall have become totally disabled in the line of duty at any time as aforesaid. In case of death of such pensioner, his widow, if any, shall receive during her life or until remarried, the sum of $50.00 per month; provided however that no such widow shall receive any such sum hereunder unless she was the lawful wife of said pensioner prior to

his retirement from active service. If such pensioner at death leaves no widow or if pensioner's widow was not the lawful wife of pensioner prior to his retirement from active service, but leaves orphan children under the age of 16 years, such orphan child or children, except adopted children, adopted subsequent to said pensioner's retirement from active service, shall receive until reaching the age of 16 the sum of $50.00 per month. Upon the death of any member or pensioner under this Act, from any cause, who has no dependents entitled to his pension, the money he has paid into the pension fund shall be paid to his estate at his death.

Sec. 2. Be it further enacted that section 5 of the aforesaid Act approved August 15, 1924, as amended, be and the same is hereby stricken and a new section 5 inserted in lieu thereof which shall read as follows: Section 5. When such member shall be retired for total disability, he shall be paid $75.00 per month for the rest of his life; but this Act shall not affect the salary of a member in active service, except the tax of 2% thereon.

Sec. 3. The aforesaid act approved August 13, 1924, as amended, is further amended by striking section 5-a, as set up by the Act of the General Assembly of Georgia, approved August 24, 1931, amending said Act, and inserting in lieu thereof a new section 5-a, to read as follows:

Section 5-a. Should any member become totally disabled so as to make such member unfit for fire duty or services, he shall receive a pension graduated as follows:

After five (5) years service	$15.00
After ten (10) years service	$30.00
After fifteen (15) years service	$45.00
After twenty (20) years service	$60.00
After twenty-five (25) years service	$75.00

Upon the death of any member or pensioner, not in line of duty, his widow, if any, shall be paid during the rest of her life, or until she remarries, the sum of money monthly graduated according to the length of

service of her deceased husband before his retirement on account of disability, or before his death, as follows:

After five (5) years service	$10.00
After ten (10) years service	$20.00
After fifteen (15) years service	$30.00
After twenty (20) years service	$40.00
After twenty-five (25) years service	$50.00

provided, however, that no such widow shall receive any sum hereunder unless she was the lawful wife of said pensioner prior to the time he became disabled. If said pensioner or member die without leaving a widow, or if pensioner's widow was not the lawful wife of pensioner prior to his disability, pensioner's minor child or children, except adopted children, adopted subsequent to said pensioner's retirement from active service, shall be paid the same gross sums and according to the same graduated schedule as set out above for the widow until they reach the age of 16.

Sec. 4. Said Act approved August 13, 1924, and amended by an Act approved August 24, 1931, is further amended by striking sections 6 and 6-a of said Act, as amended, and inserting in lieu thereof a new section 6 to read as follows: Section 6. Be it further enacted that there is hereby established, to serve without pay, a Board of Trustees whose duties it shall be to manage said funds which shall be kept by the City Treasurer of such cities as a separate fund and covered by his bond as such. The Board of Trustees shall consist of the City Treasurer, the City Comptroller, and three members of the fire department to be elected by the members of said fire department in active service, on the first Monday in September after the passage of this Act. The member receiving the highest number of votes shall serve for a term of three years from his election or until his successor is elected. The member receiving the second highest number of votes shall serve for a term of two years from his election or until his successor is elected. The member receiving the third highest number of votes shall serve for a term of one year from his election or until his successor is elected. Thereafter, upon the expiration of the

term of each such Trustee the members of said department shall vote upon a successor to said Trustee and the member receiving the highest number of votes shall be elected for a term of three years or until his successor is elected. The City Comptroller and City Treasurer shall be permanent members of the Board.

Sec. 5. Said Act approved August 13, 1924, is further amended by striking section 9 of said Act and inserting in lieu thereof a new section 9 to read as follows: Section 9. A tax of two (2) per centum shall be levied on the monthly salaries of all members in active service at the time of and after the passage of this Act, and the City Treasurer shall retain that amount from their salaries to be applied toward the purposes of this Act.

Sec. 6. Be it further amended that said Act approved August 13, 1924, as amended, be further amended by striking therefrom section 10 of said Act, as amended, and inserting in lieu thereof a new section 10 to read as follows: Section 10. A tax of one and one-fourth (1¼) per centum shall be levied against the premiums of all fire and lightning insurance companies or associations or property situated within the corporate limits of such cities, to be collected from and after the passage of this Act. Should this section of this Act, or should Section 9-a above, be declared unconstitutional or invalid for any reason, the law in force prior to the passage of this Act under section 10 of the Act approved August 13, 1924, as amended by the Act approved August 24, 1931, shall be and remain in force and shall apply to the provisions contained in other sections of said Act as amended.

Sec. 7. Said Act approved August 13, 1924, as amended by an Act approved August 7, 1925, and by an Act approved August 24, 1931, is further amended by striking section 14-a of said Act as amended and inserting in lieu thereof a new section 14-a to read as follows: Section 14-a. Be it further enacted that when any fireman who has served twenty-five years and is in active service at the time of his death dies, his widow or minor children, natural or adopted, shall receive the same pension she would have received under this Act as amended had such fireman been retired and receiving a pension under Section 4 thereof.

Sec. 8. Be it further enacted that all persons now receiving pensions under the provision of said Act approved August 13, 1924, and amendments thereto, shall henceforth receive such pensions in the amounts and only under the conditions provided for in this Act. Provided, however, that all persons now receiving pensions under said Act approved August 13, 1924, as amended, on account of total disability not from accident in line of duty but after five (5) years service, shall after the passage of this Act receive the sum of $15.00 per month.

Sec. 9. Be it further enacted that should any clause or portion of this Act be declared unconstitutional or invalid by any court of this State for any reason, it shall not invalidate any other portion thereof, but shall affect only that part so declared to be unconstitutional or invalid.

Sec. 10. Be it further enacted that all laws and parts of laws in conflict herewith be, and the same are hereby repealed.

Approved March 28, 1935.

GA. LAWS, 1945, PP. 1080-1086

AN ACT to amend the act approved August 13, 1924 (Acts 1924, Page 167) entitled "An Act to provide that cities having a population of more than 150,000 by the United States Census of 1920 or any subsequent census shall furnish aid, relief, and pensions to members of paid fire departments now in active service, etc.," as amended by the act approved August 24, 1931 (Acts 1931, Page 223), and further amended by the act approved March 28, 1935 (Acts 1935, Page 450), so as to increase the amounts of pensions to be paid where one retires after 25 years in active service and to the widows of such pensioners; to increase the amount to be paid on account of total disability; to fix the age and length of service for retirement as a matter of right; to fix the method of computation of the amount of pension to be paid; to provide for the refund in case of withdrawal from pension fund; to provide for the right to retire on account of total disability; and for other purposes.

Be it enacted by the General Assembly of the State of Georgia and it is hereby enacted by authority of the same as follows:

Section 1. That the Act approved August 13, 1924, (Acts 1924, page 167) entitled "An Act to provide that cities having a population of more than 150,000 by the United States Census of 1920 or any subsequent census shall furnish aid, relief, and pensions to members of paid Fire Departments now in active service, etc.," as amended by the Act approved August 24, 1931, (Acts 1931, page 223) and further amended by the Act approved March 28, 1935 (Acts 1935, page 450) be and is hereby further amended as follows:

"Section 4. When such member shall retire as a matter of right, he shall be paid thereafter for the rest of his life 55% of the monthly salary or pay that he was receiving at the time of such retirement, but the maximum amount to be paid to any fireman as a pension shall be the sum of $100.00 per month, provided he shall have served the 25 years in active service at the time of his retirement, or shall have become totally disabled in the line of duty at any time as aforesaid. In case of death of such pensioner, his widow, if any, shall receive during her life or until remarried, a sum equal to three-fourths of the amount the pensioner was drawing at the time of his death; provided however that no such widow shall receive any such sum hereunder unless she was the lawful wife of said pensioner prior to his retirement from active service. If such pensioner at death leaves no widow or if pensioner's widow was not the lawful wife of pensioner prior to his retirement from active service, but leaves orphan children under the age of 16 years, such orphan child or children, except adopted children, adopted subsequent to said pensioner's retirement from active service, shall receive until reaching the age of 16, a sum equal to three-fourths of the amount the pensioner was drawing at the time of his death. Upon the death of any member under this Act, from any cause, who has no dependents entitled to his pension, the money he has paid into the pension fund shall be paid to his estate at his death."

Section 2. Be it further enacted that Section 5 of the Act approved August 15, 1924 as amended by the Acts approved August 24, 1931 and March 28, 1935 be and is hereby stricken as amended and a new Section 5 inserted in lieu thereof, which shall read as follows:

"Section 5. When such member shall be retired for total disability from injuries received in line of duty, he shall be paid 55% of his monthly salary that he was receiving at the time he was injured, but the maximum amount to be paid to any fireman as a pension shall be the sum of $100.00 per month for the rest of his life, subject, however, to the right of the Board to re-examine such pensioner on the question of total disability or discontinuance of pension as is hereinafter provided by Section 8 of this Act."

Section 3. That the aforesaid Act approved August 13, 1924 as amended by the Act approved August 24, 1931, creating a section known as Section 5a, as further amended by the Act approved March 28, 1935, be amended by striking Section 5a, as amended, and inserting in lieu thereof a new Section 5a to read as follows:

"Section 5a. Should any member become totally disabled not in line of duty but not on account of injuries or ill health brought about on account of his own indiscretion so as to make such member unfit for fire duty or service, he shall receive a pension graduated as follows: After 5 years and less than 10 years of service, he shall be entitled to receive as a pension 5/25ths of the pension that he would have received if he had served 25 years; after 10 years of service, he would be entitled to receive as a pension 10/25ths of the full pension that he would have received if he had served 25 years and each year thereafter there shall be a graduated increase based upon the number of years that he serves as bears to his years of service based upon the 25 years. To illustrate, if he becomes totally disabled after 11 years of service, he would be entitled to receive 11/25ths of the full pension that he would be entitled to after 25 years of service and progressively

thereafter, so that if he should become disabled after 24 years of service, he would be entitled to receive 24/25ths of the pension he would be entitled to after serving 25 years, but in no event shall he receive more than 25/25ths of the amount of pension he would have received after serving 25 years.

"Upon the death of any member or pensioner not in line of duty, his widow, if any, shall be paid during the rest of her life or until she remarries three-fourths of the pension that the member or pensioner would have been entitled to if he himself had applied for a pension at the time of his death and graduated according to the length of service of the deceased husband before his retirement on account of disability or before his death and the said graduated scale shall be on the same ratio and computed in the same manner as set out above in this section as to a member becoming totally disabled after 5 years of service and applying for a disability pension except that the widow shall be entitled to only three-fourths of the amount of pension that her husband would have been entitled to. To illustrate, after 5 years of service and less than 10 years of service, she would be entitled to three-fourths of 5/25ths of the full pension that her husband would have been entitled to if he had served 25 years and the illustrations as applied to the first part of this Act, as to service after 10 years, is applicable here except that the widow would only be entitled to recover three-fourths of the amount that her deceased husband would have been entitled to. Provided, however, that no such widow shall receive any sum hereunder, unless she was the lawful wife of said pensioner prior to the time he became disabled. If said pensioner or member die without leaving a widow, or if pensioner's widow was not the lawful wife of pensioner prior to his disability, the pensioner's minor child or children except children adopted subsequent to said pensioner's retirement from active service shall be paid the same gross sums according to the same graduated scale as set out above for the widow until such child or children reach the age of 16 years. In

determining the number of years of service, no fractional part of the year shall be considered. That is to say, a person who has served 18 years and 9 months would be pensioned on a basis of 18/25ths of the full pension or for 18 years of service."

Section 4. That the aforesaid Act of 1924, as amended by the Acts of 1931 and 1935, be further amended by adding a new section, which shall read as follows:

"Effective April 1, 1945, any person employed on or after that date must attain the age of 55 years and have served 25 years before being eligible to retire on a pension, provided, however, the provisions of this section shall not apply to any person on the payroll as of March 31, 1945 nor any person claiming a pension by reason of permanent disability."

Section 5. The aforesaid Act of 1924, as amended by the Acts of 1931 and 1935, be further amended by adding the following new section, to-wit:

"That any member participating in the provisions of this Act who leaves the employ of said City before being eligible for retirement shall have refunded to him an amount equal to the amount paid into the said fund less one-half of one per centum per year to cover each year that the member had paid into the fund and received protection under this Act. To illustrate, if at the end of the first year, the member has paid into said fund $10.00 and leaves the services of the City or withdraws from the pension fund, he shall be entitled to a refund of said $10.00 less one-half of one per centum or if at the end of twenty-four years, he has paid into said fund $240.00, he would be entitled to a refund of $240.00 less twelve per centum."

Section 6. The said Act approved August 13, 1924, as amended by Section 5 of the Act approved March 28, 1935, is hereby amended by striking Section 9 of said Act as amended and inserting in lieu thereof a new section, which shall read as follows:

"Section 9. Beginning April 1, 1945, three per centum

shall be deducted from the salaries and wages of all members of said Fire Department up to a maximum of $200.00 per month or a total deduction of $6.00 per month. Where a member has either a wife or a minor child or children, which children are under the age of 16 years, it shall be mandatory that he designate such wife or child or children as his beneficiaries and in such case, there shall be deducted from the member having the beneficiary, the sum of four per centum from his monthly salary or wage up to a maximum of $200.00 or a total of $8.00 per month deduction, as and when paid. If, at the time of the effective date of this Act, a member does not have anyone who is eligible to be named as beneficiary, but later does have a person who is eligible to be a beneficiary, he shall designate such beneficiary and shall pay into said pension fund an additional 1% upon his salary up to a maximum of $200.00 or not more than $2.00 per month from April 1, 1945. Provided, however, where the member retires by reason of length of service, the widow shall not be eligible to receive the pension benefits of deceased pensioner unless she married such pensioner at least 5 years before he became eligible to retire."

Section 7. The aforesaid Act of 1924, as amended by the Acts of 1931 and 1935, be and it is hereby amended by striking Section 3 of the Act of 1924 and substituting in lieu thereof the following Section 3:

"Section 3. Any member of such department in active service whose name is on the payroll or who shall be injured or whose health shall become permanently impaired to such an extent as to render him totally disabled as a result of such service, shall upon application be retired. The Board of Trustees shall have the applicant for a pension on account of permanent and total disability examined by competent physicians and surgeons. In passing upon the question of permanent and total disability, they may receive and consider the reports and recommendations of such examining medical officers and the applicant shall have the right to submit medical and other competent evidence on the

question of his disability and right to be retired. If the Board of Trustees determines that the applicant is not totally and permanently disabled, the act of the Board shall be final. If the determination be that the applicant is totally and permanently disabled, he shall be retired subject, however, to the following conditions: (a) the Board of Trustees shall have the right to at least once a year require the pensioner to submit to a medical examination for the purpose of determining whether or not the pensioner has sufficiently recovered from his disability and is able to return to his former position; (b) if the Board, after such examination, determines that the pensioner is not actually totally and permanently disabled but is able to return to his former position or employment, he occupied at the time of retirement and such employment and status as to position, pay and service credit at the time of retirement is offered to such pensioner and he takes the former position or fails or refuses to take such offer, then the payment of such disability pension shall cease."

Section 8. The effective date of this Act shall be April 1, 1945.

Section 9. All laws and parts of laws in conflict herewith are hereby repealed.

Approved March 9, 1945.

APPENDIX "C"

FULTON SUPERIOR COURT

No. A-28141

CITY OF ATLANTA

vs.

PAUL ANGLIN, SR., et al.

Judgment and Decree

The foregoing case coming on to be heard, after consideration of the pleadings, and after argument of counsel

thereon, and it appearing to the Court that no issue of fact is involved in said cause under the construction of law placed by the Court upon the issues involved.

It Is Considered, Ordered, Adjudged and Decreed as Follows:

1. It is the duty of the Board of Trustees of the Firemen's Pension Fund to pay the defendants, retroactive to the dates of their respective retirements, a pension in the amount of one-half of the salary paid to such defendants at the time of their retirement, but in no event less than $100.00 per month.

2. In the event there are not sufficient funds available to the Board of Trustees of the Firemen's Pension Fund with which to pay the pension due these defendants, it is the duty of the City of Atlanta to appropriate such additional funds as are necessary, from the treasury of said city, and to cause same to be made available to the Board of Trustees of the Firemen's Pension Fund.

3. The Act creating the Firemen's Pension fund for cities of the size of the City of Atlanta, of 1924 (Acts 1924, pages 167-173), and the amendment thereto of 1931 (Acts 1931, pages 223-228) are not unconstitutional or void for any reasons assigned in the plaintiff's petition.

4. No estoppel, accord and satisfaction or novation resulted from the adoption of the Acts of 1935 (Georgia Laws 1935, page 450) or the Act of 1945 (Georgia Laws 1945, page 1080). Nor did the conduct of the defendants subsequent to the date of the passage of said respective Acts create an estoppel, accord and satisfaction, or result in a novation in the contract between the City of Atlanta and the defendants.

5. Neither the Act of 1935 (Georgia Laws 1935, page 450) nor the Act of 1945 (Georgia Laws 1945, page 1080) operated to effect a reduction in the amount of pension to be paid the defendants, below the maximum set by the Act of 1924 (Georgia Laws 1924, pages 167-173) as amended by the Act of 1931 (Georgia Laws 1931, pages 223-228).

6. Insofar as the Acts of 1935 or 1945 are construed to effect a reduction in the amount of the pension which was due the defendants under the Acts of 1924 and 1931, supra, such Acts as applied to the defendants were unconstitu-

tional and void as attempts to impair the obligation of a contract, and to destroy vested rights, contrary to the State and Federal Constitutions.

7. No injunction is issued against the defendant pensioners to prevent them from seeking enforcement of the rights declared hereunder in the event the Board of Trustees of the Firemen's Pension Fund of the City of Atlanta, or the plaintiff City of Atlanta, should fail to accord the defendant pensioners their rights as declared hereunder.

8. The prayer for injunction against the members of the Board of Trustees, seeking to restrain such Board from paying out the additional pensions approved by the Board and decreed in this order is specifically denied.

9. The defendant pensioners are each entitled to recover and be paid the monthly pensions set opposite their respective names in Paragraph 27 of the answer to the plaintiff's petition for the remainder of their lives, and further to be paid as a lump sum in cash to the date of January 1, 1952, the amount set forth in the column so listed in Paragraph 27 of the response.

10. It is ordered that the costs of this proceedings be paid by the plaintiff, City of Atlanta.

This 23rd day of February, 1952.

RALPH H. PHARR,
Judge, Superior Court,
Atlanta Circuit.

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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 343

CITY OF ATLANTA,

Appellant,

vs.

PAUL ANGLIN, SR., ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

STATEMENT OF BOARD OF TRUSTEES OF THE FIREMEN'S PENSION FUND OF THE CITY OF ATLANTA OPPOSING JURISDICTION AND MOTION TO DISMISS.

WELBORN B. CODY,
Counsel for Appellee.

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IN THE SUPREME COURT OF THE STATE OF GEORGIA

No. 17851

CITY OF ATLANTA,
Plaintiff in Error,

vs.

PAUL ANGLIN, SR., ET AL.,
Defendants in Error

STATEMENT OF BOARD OF TRUSTEES OF THE FIREMEN'S PENSION FUND OF THE CITY OF ATLANTA, DEFENDANTS IN ERROR DISCLOSING LACK OF JURISRDICTION OF SUPREME COURT OF THE UNITED STATES AND MOTION TO DISMISS APPEAL.

This statement and motion is made pursuant to paragraph 3, Rule 12, of the Supreme Court of the United States which requires that this statement and motion be filed with the clerk of the court possessed of the record within fifteen (15) days after service of the appeal.

This lack of jurisdiction and motion to dismiss is based upon the following grounds:

Ground 1

It seems to be an elemental and well recognized rule of law that a State Legislature has plenary power over the affairs of a municipal corporation which it creates and has the power to direct how its revenue shall be applied, with

the result that such municipality does not have the protection of the usual constitutional guaranties as regards such legislative control.

Volume 37 of American Jurisprudence, § 78, p. 692, in discussing constitutional limitations, contains the following language:

> "It has frequently been stated that municipal corporations have no rights, privileges, or immunities within the protection of the usual constitutional guaranties as against legislative control, although this rule is subject to exception, in some jurisdictions, in the case of rights possessed by municipalities in their private or proprietary capacity."

We have undertaken to analyze the several cases cited under this section and wish to give the court the benefit of the following:

In *City of Trenton* v. *State of New Jersey*, 262 U. S. 182 (43 S. Ct. 534) headnotes 7 and 8 are as follows:

> "7. A municipality is merely a department of the state and the state may withhold, grant, or withdraw powers and privileges as it sees fit, however great or small the sphere of action of the municipality.
>
> "8. The power of a state over the rights and property of cities held and used for governmental purposes is unrestrained by the contract clause or the Fourteenth Amendment of the federal Constitution."

In this case the State of New Jersey sought to take away from the City of Trenton certain water rights and a license fee right with respect to which the City of Trenton claimed a constitutional restraint. In referring to such constitutional restraints, the court summed up the proposition in the following statement, which is about as brief as could be made on the subject: "They do not apply as against the State in favor of its own municipalities."

In *City of Newark* v. *State of New Jersey*, 262 U. S. 192 (43 S. Ct. 539), the City of Newark sought to prevent the enforcement by the state of a provision of a legislative act imposing upon the city specified annual payment for the diversion of water. The ruling of the court was that the regulation of a municipality is a matter peculiarly within the domain of the state.

Possibly the leading Federal case on this subject and one which seems to have been cited more than any other is that of *Williams* v. *Mayor and City Council of Baltimore*, 289 U. S. 36 (53 S. Ct. 431), wherein headnote 2 is as follows:

> "2. Municipal corporation created by state for better ordering of government has no privileges or immunities under Federal Constitution which it may invoke in opposition to will of its creator."

Another well considered case on the subject is that of *George* v. *City of Ashville*, 80 F. (2) 50, wherein headnotes 10, 11 and 12 are as follows:

> "10. Legislature could direct that revenues derived from municipal enterprise should be applied on outstanding bonds as well as on bonds thereafter to be issued for such enterprise.
>
> "11. Legislature has plenary power to control finances of municipal corporations which it creates and to direct how their revenues should be applied.
>
> "12. City created by Legislature can raise no objection under Federal Constitution with regard to statute controlling municipal finances and directing how muncipal revenues should be applied."

In the body of the decision on Page 55, the court, in discussing the problem, used the following language:

> "There can be no question, so far as the City is concerned, as to the power of the Legislature to direct that revenues derived from municipal enterprises shall be applied on outstanding bonds as well as upon bonds

thereafter to be issued; for the Legislature has plenary power to control the finances of the municipal corporations which it creates, and to direct how their revenues shall be applied. The city can raise no question with regard thereto under the federal constitution; for, as said by Mr. Justice Cardozo in Williams, Receiver of the W. B. & A. R. Co. v. Mayor & City Council of Baltimore, 289 U. S. 36, 40, 53 S. Ct. 431, 432, 77 L. Ed. 1015, 'A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke.' And there is nothing in the Constitution of North Carolina which prevents the exercise of such powers by the Legislature. On the contrary, article 8, § 4, of the Constitution of North Carolina expressly provides: 'It shall be the duty of the Legislature to provide by general laws for the organization of cities, towns, and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessment and in contracting debts by such municipal corporation.' And the plenary power of the Legislature over municipal corporations is thus tersely expressed by the North Carolina Supreme Court in Town of Murphy v. C. A. Webb & Co., 156 N. C. 402, 72 S. E. 460, 461; 'While in respect to cities and towns, it is said that the power of the Legislature to control them, in the exercise of their municipal powers, is somewhat more restricted than in the case of counties, yet both are but instrumentalities of the state for the administration of local government, and their authority as such may be enlarged, abridged, or withdrawn entirely at the will or pleasure of the Legislature.' "

This rule of law is one which has been followed by the Supreme Court of Georgia, in *Ellington Co.* v. *City of Macon*, 177 Ga. 541 (170 S. E. 813). At page 544, the court used the following language:

> "In Williams v. Baltimore, 289 U. S. 36 (77 L. Ed. 531), it was held by the Supreme Court of the United

States that 'a municipal corporation, created by a State for the better ordering of government, has no privileges or immunities under the Federal Constitution, which it may invoke in opposition to the will of its creator.' The same principle would be applicable as to provisions of the State constitution."

There are many other decisions of state appellate courts recognizing this same rule. One such case is *Sanger* v. *City of Bridgeport*, 198 Atl. (Conn.) 746, wherein headnotes 8 and 12 are as follows:

"8. Municipalities and political subdivisions of state created for public purposes and having their powers, rights, and duties conferred and imposed by state through Legislature are subject to its will and liable to have any such rights or duties modified or abolished by it, and not to be regarded as thereby being deprived of any vested rights.

"12. Municipalities may be compelled not only to recognize their legal obligations, but also to discharge those of an equitable and moral nature."

It is apparent from the foregoing decisions that the underlying theory of this rule of law is that a municipality is a creature of the legislative body of the state, which municipality is created for the purpose of acting as a subordinate branch of the State Government. For a city to question the validity of an act of the Legislature of the State is somewhat analogous to a minor contesting the parental control of a father. If a city is an instrumentality of a state, its principle purpose is to act for and in behalf of the state and according to the will of the state, and it seems perfectly harmonious from a legal standpoint to say that, if it was intended for a city to have the right to contest the constitutionality of legislative acts, the Constitution itself would have clearly so provided.

Concluding our discussion of this ground, let it be clearly

understood that we are urging the application of this rule of law only as regards conflicts between the state and its municipalities in ordinary governmental functions. We concede that there is one well recognized exception to the rule, namely, the proprietary or private rights of a municipality. We concede that if a municipality has acquired the ownership of real estate (which is a proprietary right) that the state cannot, by a legislative act, take this property from it. This right, however, is quite different from the state, by legislative act, instructing the municipality how its particular government shall be operated and the conditions under which such municipality might be liable in actions *ex delicto* or actions *ex contractu*.

It so happens that the Supreme Court of Georgia, in *West* v. *Trotzier*, 185 Ga. 794 (196 S. E. 902), had occasion, in 1938, to pass upon this same pension law affecting firemen in the City of Atlanta, wherein it was sought to test the validity of the section requiring the City of Atlanta to contribute from its general revenues such existing deficit. It so happens that the Supreme Court of Georgia, in that case, held that such a legislative requirement imposed upon the City of Atlanta was of governmental or public nature and that the General Assembly was acting within its sovereign power in enacting such legislation. The court, in this decision, used the following language:

> "12. There is nothing in the constitution of this State which guarantees to the people living within the limits of a municipal corporation the absolute right of local self-government. How far people so situated may be allowed to participate in the choice of officers who are to administer the affairs of the local government is a matter exclusively within the judgment and discretion of the General Assembly." *Mayor &c of Americus* v. *Perry*, 114 Ga. 871 (40 S. E. 1004, 57 L. R. A. 230). Therefore the contention is without merit, that the said acts of the General Assembly which impose an obliga-

tion upon the City of Atlanta to contribute from its general revenues an amount to pay a certain designated amount each month to pensioners of the fire department "is an arbitrary, unreasonable and illegal interference on the part of the General Assembly with the municipal functions of the City of Atlanta, which are private in nature, and are not of such governmental or public nature that the General Assembly in its sovereign power has a right to control."

Such an interpretation of the Georgia statute by the court of highest authority of the State of Georgia is binding on the Supreme Court of the United States. See *Aero Mayflower Transit Co.* v. *Board of Railroad Com'rs of State of Montana, et al.*, 68 S. Ct. 167, headnote 1.

Ground 2

The Supreme Court of the United States has, on several occasions, held that it has no jurisdiction to review a mere declaratory judgment. This proposition was plainly declared in *Liberty Warehouse Company* v. *Burley Tobacco Growers' Co-op Marketing Ass'n*, 48 S. Ct. 291, headnote 4. The decision rendered in that case refers to the previous language adopted by the court in *Liberty Warehouse Company* v. *Grannis*, 47 S. Ct. 282. We confess that we are not in full sympathy with the rule of law expressed in these cases, but they are, nevertheless, an interpretation of the law as to the jurisdiction of the Supreme Court in the review of cases from a lower court.

Ground 3

Plaintiff in error contends, in its assignment of errors, that the Supreme Court of Georgia erred in holding that the legislative act of 1931 did not impair the obligation of the existing contract, which contract had theretofore been created by the legislative act of 1924. This statement is not

correct. What the Supreme Court of Georgia held as regards this particular point was that the legislative act of 1931 created a new contract. Headnote 5 of the decision of the Supreme Court of Georgia, herein complained of, is as follows:

> "5. The plaintiff contends, and counsel has earnestly argued, that the amending act of 1931, and particularly that part of section 6 thereof which is quoted in our statement of the facts, impaired the obligation of its contract as created under and in consequence of the original pension act of 1924 by imposing further burdens upon it and by conferring additional benefits upon the defendant fireman; hence it offends article 1, section 3, paragraph 2 of the Georgia Constitution of 1877 and article 1, section 10, paragraph 1 of the Constitution of the United States, which inhibit the enactment of any law impairing the obligation of a contract. Conceding, but not holding, this to be true, a reversal of the judgment presently complained of would not be required; and this is true because the services rendered by these defendant firemen and the contributions they made to the city's pension fund, after the passage and approval of the amending act of 1931, provided and furnished ample consideration for a new pension contract under the amending act. See, in this connection, Bender v. Anglin, supra." (See page 9, Appendix A of the appeal of the plaintiff in error.)

Opposing counsel argue that the 1931 statute could not have created a new contract because there was no consideration therefor. The Supreme Court of Georgia stated that there was ample consideration for such a new or amended contract because of the services rendered by the firemen and the contribution made by them to the pension fund after the passage of said act of 1931. Opposing counsel argue that the firemen, under the 1931 act, paid no more into the fund than they were theretofore required to pay, and they rendered no different service than that which they had been

rendering. The answer to this is that they could terminate their employment with the City at will, and that by the continuance in the service under these conditions, they agreed to work under the provisions of said act. This is the interpretation placed upon the 1931 act by the Supreme Court of Georgia, as will be seen by the language just above quoted. Such interpretation must be followed by the Supreme Court of the United States. See *Aero Mayflower Transit Co.* v. *Board of Railroad Com'rs of State of Montana, et al.*, 68 S. Ct. 167, wherein headnote 1 is as follows:

> "1. The United States Supreme Court is bound by the construction given to state statutes by state courts."

Conclusion

The Supreme Court of the United States, in the interpretation of its rules, has many times held that a decision by a state court holding a state statute invalid as repugnant to like provisions in both Federal and State Constitutions, rests upon an adequate non-Federal ground and will not be reviewed by the Supreme Court. See *Lynch* v. *New York*, 55 S. Ct. 16.

The decision of the Supreme Court of Georgia now complained of was divided into many parts, one part of which held a state statute repugnant both to the State and Federal Constitutions. That part of the decision of the Supreme Court of Georgia and other similar parts could not, therefore, constitute the basis of any present appeal. This appeal, therefore, is necessarily limited to only that part of the decision of the Supreme Court of Georgia which has to do with the validity of the legislative act of 1931 which is set out in Appendix B, pages 7 through 11 of the Appeal of Plaintiff in error.

Therefore, upon each and all of the grounds herein stated, the Defendant in error, namely the Trustees of the Fire-

men's Pension Fund of the City of Atlanta, moves to dismiss the appeal.

Respectively submitted,

SMITH, KILPATRICK, CODY, ROGERS, & McCLATCHEY,
By WELBORN B. CODY,
Counsel for Defendant in Error,
Trustees of the Firemen's Pension Fund of the City of Atlanta.

WELBORN B. CODY,
Of Counsel.

Address: 1045 Hurt Building, Atlanta, Georgia.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 343

CITY OF ATLANTA, Appellant

vs.

PAUL ANGLIN, SR., Et Al, Appellees

BRIEF OPPOSING MOTION TO DISMISS APPEAL FILED ON BEHALF OF BOARD OF TRUSTEES OF THE FIREMEN'S PENSION FUND.

J. C. SAVAGE, J. C. MURPHY, J. M. B. BLOODWORTH,
JOHN E. FEAGIN and HENRY L. BOWDEN,

Attorneys for Appellant

E. V. HARRIS PRINTING COMPANY, ATLANTA, GEORGIA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 343

CITY OF ATLANTA, Appellant

vs.

PAUL ANGLIN, SR., Et Al, Appellees

BRIEF OPPOSING MOTION TO DISMISS APPEAL FILED ON BEHALF OF BOARD OF TRUSTEES OF THE FIREMEN'S PENSION FUND.

This brief opposing the motion to dismiss the appeal filed by counsel for the Board of Trustees of the Firemen's Pension Fund is filed pursuant to Paragraph 3, Rule 7 of the Rules of this Honorable Court. We shall deal with the objections made to jurisdiction in the order discussed in the motion.

GROUND I

Counsel for the Board of Trustees is correct with respect to the general rule relating to municipalities. It is true that municipalities are creatures of the State and may not question the power of the State to exercise

its police power. Municipalities, however, have and exercise powers that are not strictly governmental in character and obviously counsel for the Board failed to pursue his investigation to determine the extent of the exceptions to the general rule. One of the exceptions is that municipalities, when authorized to do so by law, may make contracts under which rights are acquired or liabilities incurred, and the Legislature of the State cannot legally pass any statute impairing rights thus acquired either by the municipal corporation or by persons dealing with it. Here, the statutory obligation relating to pensions has been fully satisfied and the right to additional pensions asserted upon behalf of the pensioners, who are parties to this suit, arise by virtue of an alleged contract with the City. Unless there is a contract which may not be impaired by subsequent legislation, the pensioners are not entitled to any additional payments. A case in point on this question is *Superior Water, Light and Power Company v. The City of Superior*, 263 *U. S.* 125, where this Court said, at the bottom of page 135 and the top of page 136:

> "Through its contract with the city the water company acquired valuable property rights. They were not directly created by any statute enacted under section I, art. II, of the state Constitution, but were the outcome of agreement with a fully empowered corporation. They did not arise from the mere exercise of a governmental function legislative in character, but from contract expressly authorized by the Legislature. None of the decisions of the Supreme Court of Wisconsin prior to 1889 to which we have been referred construes the reservation in the state Constitution as having the extraordinary scope accorded to it below, and certainly, in the absence of some very clear and definite pronouncement, we cannot accept the view

that it then had the meaning now attributed to it."

Contracts made by cities create obligations on the taxpayers which continue to exist regardless of what may happen to the municipal corporation. Unless the city can raise Federal questions involving contracts, the contract clause of the Federal Constitution would be a nullity and would afford no protection to taxpayers. The City, of course, in all such suits, represents the taxpayers. The Supreme Court of Georgia, in the case of *Bender v. Anglin*, 207 *Ga.* 108, in a case involving the particular statutes here under consideration, definitely held that the retired members of the Fire Department, who brought that action "had been a party to the contract since its inception with the approval of the original law of 1924." The retired members of the Fire Department who are parties to this case all were employed prior to the approval of the original law of 1924 (*Ga. Laws*, 1924, *p.* 167) and were so employed when the Act was amended by the Act of 1931 (*Ga. Laws*, 1931, *p.* 223) and when the Act was further amended in 1935 (*Ga. Laws*, 1935, *p.* 450).

We direct the Court's further attention to the decision of this Honorable Court in the case of *Superior Water, Light & Power Company v. The City of Superior, et al*, 263 *U. S.* 125. In that case the City had entered into a contract with the Company for a period of 30 years granting to them the privilege of establishing, maintaining and operating a system of water works with the right to acquire the property under certain conditions at the termination of the period of 30 years. Subsequently the General Assembly of the State amended the law authorizing the original contract so as to constitute an "indeterminate permit." The action there involved an effort of the City to acquire by condemnation the property after the expiration of the

period. The Court there not only recognized the right of the City to contend that they were protected by the contract clause of the Federal Constitution, but held:

> "The integrity of contracts — matter of high public concern — is guaranteed against action like that here disclosed by section 10, art. 1, of the federal Constitution, 'No state shall * * * pass any * * * law impairing the obligation of contracts.' It was beyond the competency of the Legislature to substitute an 'indeterminate permit' for rights acquired under a very clear contract. *Vicksburg v. Vicksburg Waterworks Co.*, 206 *U. S.* 496, 27 *Sup. Ct.* 762, 51 *L. Ed.* 1155; *Detroit United Ry. v. Michigan*, 242 *U. S.* 238, 253, 37 *Sup. Ct.* 87, 61 *L. Ed.* 268. The erroneous conclusion concerning this federal question led to the decree below. Accordingly it must be set aside and the cause remanded for further proceedings not inconsistent with this opinion."

We submit that the case at bar is clearly analagous to the case cited immediately above.

GROUND II

Counsel for board members apparently reluctantly makes the point that the Court has no jurisdiction to review a mere declartory judgment. The cases cited have no bearing on the judgment rendered in this case. We readily agree that the Court is without jurisdiction to review any judgment which is not final and which does not adjudicate the Federal issues involved. However, this Court in the case of *Nashville, Chattanooga & St. Louis Railway Company v. Wallace, Comptroller of the Treasury of Tennessee, et al*, 288 *U. S.* 249, at page 259 held:

> "In determining whether this litigation pre-

sents a case within the appellate jurisdiction of this Court, we are concerned, not with form, but with substance. *See Fidelity National Bank & Trust Co. v. Swope*, 274 *U. S.* 123, 47 *S. Ct.* 511, 71 *L. Ed.* 959. Compare *Gasoline Products Co., Inc., v. Champlin Refining Co.*, 283 *U. S.* 494, 498, 51 *S. Ct.* 513, 75 *L. Ed.* 1188. Hence, we look not to the label which the Legislature has attached to the procedure followed in the state courts, or to the description of the judgment which is brought here for review, in popular parlance, as 'declartory,' but to the nature of the proceeding which the statute authorizes, and the effect of the judgment rendered upon the rights which the appellant asserts."

In the case now before the Court an actual controversy existed between the City and the retired members of its Fire Department, who had been retired by the Pension Board on a pension. The case was brought under the following statutory provisions:

> "Section 1. (a) In cases of actual controversy the respective Superior Courts of the State of Georgia shall have power upon petition, or other appropriate pleading, to declare rights, and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such." *Ga. Laws*, 1945, *p.* 137.

The judgment rendered by the court of first instance clearly requires the appellant, the City of Atlanta, to make the payments demanded by the various retired

firemen (*R.* 33 & 34).[1] The judgment entered in this case will be conclusive as between the City and the retired firemen on all legal questions put in issue, or which under the rules of law might have been put in issue in this suit. The law in this respect is as follows:

> "110-501. CONCLUSIVENESS OF JUDGMENTS. — A judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in issue, or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered, until such judgment shall be reversed or set aside." *Code of Georgia*, 1933, *Section* 110-501.

In our opinion there exists no justiciable controversy between the appellant and the members of the pension board. Based on that conclusion, we dismissed the suit as to them. (*R.* 14). They later filed an intervention. (*R.* 29). They could only have an academic interest in the results of this litigation. The members of the Fire Department are vitally concerned financially. The taxpayers of the City are materially affected.

GROUND III

Apparently counsel for the board members has misconstrued the assignment of errors referred to under this ground. The assignment of error was that the Supreme Court erred in failing to sustain the contention of plaintiff in error that the quoted portions of the Act of 1931 is violative of the contract clause (Article I, Section X, Clause I) of the Constitution of the United States. The Supreme Court of Georgia certainly con-

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(1). All record references in this brief are to pages as numbered in the original record transmitted by the Clerk of the Supreme Court of Georgia.

sidered the contention of the appellant in connection with that Federal question and failed to sustain it. The question is squarely presented in the record and if state courts by mere silence can deprive this court of jurisdiction or if state courts by putting a different construction on the act can have the same effect, then this clause of the United States Constitution would be a dead letter. It is clear that the contention that the quoted part of the 1931 Act, requiring the City to make up the deficiency, contravened the contract clause of the Constitution of the United States, was presented and argued before the Supreme Court and that the Supreme Court did not sustain the contention.

Certainly, the Supreme Court is not bound by that construction given to the act by the Supreme Court of Georgia. We recognize that it is the general rule that the Supreme Court of the United States is bound by the interpretation given to state statutes by state courts. But, as pointed out in 11 *Amer. Jur., p.* 746 (*Constitutional Law, Par.* 110), there is one important exception to the general rule. The Supreme Court of the United States will determine for itself the existence, construction and validity of an alleged contract even if this involves the construction of a statute and will then determine whether the contract as construed by it will be impaired by subsequent legislation. This doctrine has been repeatedly upheld by this Court.[2]

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(2). Coombes v. Getz, 285 U. S. 434; Millsaps College v. Jackson, 275 U. S. 129; Georgia R. & P. Co. v. Decatur, 262 U. S. 432; Milwaukee Electric R. & Light Co. v. Wisconsin, 252 U. S. 100; Seton Hall College v. South Orange, 242 U. S. 100; New York Electric Lines Co. v. Empire City Subway Co., 235 U. S. 179; Northern P. R. Co. v. Minnesota, 208 U. S. 583; Sullivan v. Texas, 207 U. S. 416; Powers v. Detroit, G. H. & M. R. Co., 201 U. S. 543; Blair v. Chicago, 201 U. S. 400; Rogers v. Alabama, 192 U. S. 226; Waggoner v. Flack, 188 U. S. 595; Northern C. R. Co. v. Maryland, 187 U. S. 258; Wilson v. Standefer, 184 U. S. 399; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1.

CONCLUSION

We think the motion filed on behalf of the Board of Trustees of the Firemen's Pension Fund, further emphasizes the importance of the questions presented by the appeal. The Supreme Court of Georgia, in its decisions involving the firemen's pension fund, have sustained acts increasing the pensions but have held any effort to reduce them to be void under the contract clause of both the Federal and the State Constitutions. They are substantially the same. The protection of these constitutional provisions should not be applied unilaterally but if they are good for the employees, they ought to be good also for the taxpayers. We respectfully submit, therefore, that this Court has jurisdiction to review the decision of the Supreme Court of Georgia presented by this appeal.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 343

CITY OF ATLANTA,

Appellant,

vs.

PAUL ANGLIN, SR., ET AL.,

Appellees

SUPPLEMENTAL BRIEF IN BEHALF OF BOARD OF TRUSTEES OF THE FIREMEN'S PENSION FUND OF THE CITY OF ATLANTA IN SUPPORT OF MOTION TO DISMISS APPEAL.

In our original statement filed with the Court opposing jurisdiction and moving to dismiss the appeal, we pointed out several cases heretofore decided by this Court holding that a State Legislature has plenary power over the affairs of a municipal corporation which it creates and has the power to direct how its revenue shall be applied, with the result that the municipality does not have the protection of the usual constitutional guaranties as regards such legislative control.

Opposing counsel in their brief opposing the motion to dismiss the appeal state that we have failed to pursue our

investigation to determine the extent of the exceptions to the general rule. They cite the case of *Superior Water, Light, and Power Company* v. *The City of Superior*, 263 U. S. 125 (44 S. Ct. 82), as illustrating the exception. Reference to this case promptly indicates that it does not support the contention for which it was cited. There, the City of Superior was not undertaking to attack the constitutionality of a Legislative Act as impairing the objection of one of its contracts. On the contrary, it was the opposite party to the contract, namely, the Superior Water, Light and Power Company which sought to contest the constitutionality of a Legislative Act which impaired the contract. The complaint in that case was brought by a private corporation, namely, Superior Water, Light and Power Company alleging that it had made a contract with the City of Superior for a thirty (30) year period whereby it had a franchise to maintain a system of water works. The contract further provided that if at the end of the thirty (30) years the City did not renew the franchise for an additional thirty (30) year period the City would be obligated to buy the company or its assets under a formula set up in the contract. The record indicates clearly that at the expiration of the thirty (30) year period, the City of Superior declined to make the purchase and declined to grant a thirty (30) year extension, but on the contrary, undertook to condemn the entire property under the power of eminent domain. This Court simply held that the Superior Water, Light and Power Company had a valid contract which could not be impaired by intervening Legislative Acts or municipal ordinances. Such a decision is quite different from a holding by this Court that a municipality has a right to make a constitutional attack on an act of the Legislature which created the municipality.

It should be borne in mind that the rule of law upon which

we insist supports our motion to dismiss the appeal applies in cases where we are dealing with governmental powers as distinguished between private or proprietary powers. The Supreme Court of Georgia in *West* v. *Trotzier*, 185 Ga. 794 (196 S. E. 902) held that the subject matter now involved was purely governmental. This construction of the Georgia statute would be binding upon this Court under the authority of *Aero Mayflower Transit Co.* v. *Board of Railroad Com'rs of State of Montana, et al.*, 68 S. Ct. 167 headnote 1. Even if this Court was not bound by such a construction, there are many decisions of this Court holding that a governmental power is involved where the Legislature of a particular state undertakes to direct a municipality how it should dispose of its revenue.

We, therefore, conclude by stating that we have found no decision of this Court which permits a municipality to question the constitutionality of a Legislative Act and obviously the case of *Superior Water, Light and Power Company* v. *the City of Superior* heretofore cited does not hold to the contrary regardless of the opinion of opposing counsel to the contrary.

Respectfully submitted,

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No. 343. CITY OF ATLANTA *v.* ANGLIN ET AL. Appeal from the Supreme Court of Georgia. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *J. C. Mur-*

phy and *Henry L. Bowden* for appellant. *Welborn B. Cody* for the Board of Trustees of the Firemen's Pension Fund of Atlanta, appellee. Reported below: 209 Ga. 170, 71 S. E. 2d 419.